Supreme Court, U.S.
FILED

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No.

In the Supreme Court of the United States

MICHIGAN HIGH SCHOOL ATHLETIC ASSOCIATION, INC.,
PETITIONER,

v.

COMMUNITIES FOR EQUITY, ET AL.,
RESPONDENTS.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The Sixth Circuit held that petitioner, the Michigan High School Athletic Association, Inc., violated the Equal Protection Clause, Title IX, and Michigan's Elliott-Larsen Act (which is co-extensive with the Equal Protection Clause). It reasoned that differences in some of the seasons selected for boys' and girls' high school athletic tournaments constituted "facial classifications" that triggered intermediate scrutiny, and that MHSAA had not satisfied its burden of establishing an "exceedingly persuasive" justification. The Court held that intentional discrimination could be presumed whenever differences "result in unequal treatment" of one sex. The following questions merit review by this Court:

(1) Whether the Sixth Circuit misinterpreted the legal standards governing proof of intentional discrimination in the context of constitutionally authorized single-sex programs, and erroneously determined that MHSAA violated the Equal Protection Clause, Title IX, and Michigan's Elliott-Larsen Act.

(2) Whether plaintiffs' Equal Protection claim under 42 U.S.C. § 1983 should be dismissed because Congress intended the comprehensive remedies authorized by Title IX of the Education Amendments of 1972 to be exclusive in this context, as recognized by the Second, Third, and Seventh Circuits.

LIST OF PARTIES

The petitioner is the Michigan High School Athletic Association, Inc., on behalf of itself and its members.

The respondents are Communities for Equity, on behalf of itself, its members, and all those similarly situated; Diane Madsen, on behalf of her minor daughters and all those similarly situated; and Jay Roberts-Eveland, on behalf of her minor daughter and all those similarly situated.

RULE 29.6 STATEMENT

Petitioner Michigan High School Athletic Association, Inc., does not have a parent corporation and no publicly held company owns 10% or more of Michigan High School Athletic Association, Inc.'s stock.

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The district court's opinion is reported at 178 F. Supp. 2d 805 (Pet. App. 69a-167a). The Sixth Circuit's first opinion is reported at 377 F.3d 504 (Pet. App. 50a-68a). The Sixth Circuit's opinion on remand is reported at 459 F.3d 676 (Pet. App. 1a-48a).

JURISDICTION

The judgment of the court of appeals was entered August 16, 2006. MHSAA's petition for rehearing *en banc* was denied on December 7, 2006 (Pet. App. 168a). This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

The text of the Fourteenth Amendment to the Constitution, Section 901(a) of Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681(a), and Michigan's Elliott-Larsen Act, Mich. Comp. Laws §§ 37.2101, *et seq.*, are reproduced at Pet. App. 169a-177a.

STATEMENT OF THE CASE

This case concerns alleged gender discrimination in the scheduling of high school athletic seasons. This Court previously granted petitioner Michigan High School Athletic Association's ("MHSAA") petition for certiorari, vacated the Sixth Circuit's earlier decision, and remanded for further consideration in light of *City of Rancho Palos Verdes v. Abrams*, 544 U.S. 113 (2005). Pet. App. 49a. On remand, the Sixth Circuit has reaffirmed its prior ruling in all significant respects. The Sixth Circuit's holding that petitioner violated the Equal Protection Clause, Title IX, and Michigan's Elliott-Larsen Act (which is co-extensive with the Equal Protection Clause) presents two questions of national importance that merit review.

First, this case presents an opportunity to clarify a fundamental point about the meaning of intentional discrimination that has divided the lower courts. The only facial gender classification here was the decision made over

thirty years ago (and not challenged here) to have separate sports teams for boys and girls. Once separate programs are established, good faith implementing decisions (such as when the teams will play or who their coach will be) will inevitably create some differences that someone can claim are disadvantageous to one team or another. The Sixth Circuit held here that every inevitable difference in the administration of separate programs that someone can claim creates a disadvantage is a new facial gender classification sufficient to presume animus. That misunderstanding improperly shifts the burden of proof and conflicts with decisions of this Court and of other circuits. Mere differences in the implementation of separate programs do not themselves classify anyone by gender, and are constitutional unless the plaintiffs prove discriminatory intent (*i.e.*, that the relevant decisions were made because of, not merely in spite of, their differential impact by sex).

Second, the Sixth Circuit acknowledges a deep circuit split over whether Title IX is the exclusive federal remedy for alleged gender discrimination in athletics, or whether plaintiffs may also rely on § 1983. This Court's GVR in light of *Rancho Palos Verde* gave the Sixth Circuit an opportunity to reconsider its circuit precedent that Title IX does not preclude § 1983 claims. The Sixth Circuit reaffirmed its position, solidifying the split.

Factual Background

Petitioner MHSAA is a private, non-profit organization that conducts interscholastic athletic tournaments and promulgates rules of competition for voluntary adoption by its member schools. MHSAA conducts 14 tournaments for girls only and 14 tournaments for boys in which girls may also compete if there is no parallel girls' team (such as wrestling or football). CAJA 2004.[1]

As girls' athletics gained in popularity in the early 1970s, MHSAA's member schools faced significantly rising

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[1] "CAJA" refers to the Joint Appendix previously submitted to the United States Court of Appeals for the Sixth Circuit in this case.

numbers of athletes and teams without a comparable increase in the availability of facilities, coaches, and officials. Schools therefore decided early on that, in certain sports, different seasons for the boys' and girls' teams would allow them to offer more athletic opportunities for all students. For example, a school with one gym may not be able to run varsity, junior varsity, and freshman teams for both boys and girls at the same time. Scheduling the girls' basketball tournament in fall and the boys' basketball tournament in winter allows Michigan girls to play both basketball and volleyball (the two most popular girls' sports), and allows schools with limited facilities or coaching resources to avoid resource conflicts and offer a better program to all students.

Specific scheduling decisions were made only after extensive discussions among MHSAA's member schools. When surveyed by MHSAA in 1973 about the best time to schedule a girls' basketball tournament, 72% of member schools voted for fall, and MHSAA scheduled the tournament to match its members' stated preferences. CAJA 3281. MHSAA has polled its member schools repeatedly about the season schedules and each time, without exception, the members responded by overwhelmingly favoring the current schedules. See CAJA 3281, 3314, 3302, 3289. In 1979, 90.2% of responding schools voted to keep girls' basketball in the fall. In 1981, 88% reaffirmed those preferences. CAJA 3289. In 1985, 88.5% of member schools preferred separate seasons for boys and girls in basketball. CAJA 3289. And coaches surveyed in 2001 voted overwhelmingly to retain the fall season for girls' basketball. CAJA 3724-25, 4240. The survey numbers are similarly compelling in other sports. The record established, and the decisions below assumed, that MHSAA's schedules were designed in good faith with no intent to disadvantage girls. Pet. App. 144a-145a, 29a-30a.

Although the particular seasons chosen in Michigan, for both girls and boys, do not uniformly conform to the season in which that sport is traditionally played at the college level, Michigan is hardly alone. Like Michigan, 18 other

states schedule girls' golf in spring, 16 schedule girls' swimming and diving in fall, 20 schedule girls' tennis in fall, and 21 schedule girls' soccer in spring. At the professional level, the WNBA has elected to play during the summer rather than simultaneous with the fall-to-spring NBA season. The NCAA similarly uses different seasons for men's and women's volleyball and water polo. And the seasons chosen by MHSAA's member schools have been very successful at promoting participation in girls' athletics. Although Michigan ranks 8th nationwide in overall population as well as population of 14- to 17-year-old girls, it ranks 5th in total student athletes, 4th in girls' participation, and in the top five in numerous individual girls' sports.[2]

Proceedings In The Trial Court

1. Respondents represent a certified class of female high school athletes in Michigan. The gravamen of their complaint is that MHSAA schedules six selected girls' sports (basketball, volleyball, soccer, Lower Peninsula golf, Lower Peninsula swimming and diving, and tennis) in "disadvantageous" seasons—either a "nontraditional" season (as measured by collegiate seasons), or a "traditional" season which is nonetheless less favorable, in plaintiffs' opinion, than the season used by either Michigan's boys or by girls in certain other states. Plaintiffs allege that these "disadvantages" violate Title IX of the 1972 Education Amendments, 20 U.S.C. §§ 1681 *et seq.* ("Title IX"), the Equal Protection Clause as enforced through 42 U.S.C. § 1983, and Michigan's Elliott-Larsen Civil Rights Act, Mich. Comp. Laws § 37.2101, which the courts below held is co-extensive with the Equal Protection Clause. Pet. App. 162a, 33a-35a. Plaintiffs have never challenged the original decision to have separate sports teams for boys and girls.

MHSAA responded that the seasons were selected by the schools themselves for legitimate logistical reasons relating to the availability of facilities, coaches, and officials.

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[2] Annual participation figures are collected at http://www.nfhs.org.

MHSAA also argued that its current scheduling was the product of good faith decisions intended to maximize participation rates, promote the independent identity and significance of girls' sports, increase the attention paid to girls' teams by student bodies and the media, and respect the preferences of member schools and many of the girls themselves. It offered evidence concerning its decision-making process, survey results from years of discussions with member schools, and testimony of prominent girls' coaches supporting its approach.

2. The district court concluded that respondents were not required to prove that the selection of these six seasons was motivated by discriminatory animus. It held instead that under *United States v. Virginia*, 518 U.S. 515 (1996) (*"VMI"*), MHSAA bore the burden to show an "exceedingly persuasive" justification for any decision to schedule boys' and girls' tournaments in different seasons—*i.e.*, that its "classification between the sexes in scheduling sports' seasons serves important governmental objectives and that this scheduling is substantially related to the achievement of those objectives." Pet. App. 146a. It held that "MHSAA chose to rely on anecdotal and weak circumstantial evidence," and had not carried that burden. *Id.* at 147a. It also found that the girls' seasons chosen for these six sports were "disadvantageous" compared to the boys' seasons or to the seasons used for girls in other states. The district court ruled that the same scheduling also violated Title IX and Michigan's civil rights statute. It ordered injunctive relief.[3]

The "disadvantages" described by the district court are highly debatable, frequently of concern to very few athletes, and often produced by scheduling decisions by outside

[3] Under that injunction, girls' basketball and volleyball would switch, with basketball moving to winter and volleyball to fall. The golf and tennis seasons in the Lower Peninsula would switch, with boys' golf and girls' tennis moving from fall to spring; and girls' golf and boys' tennis moving from spring to fall. In the Upper Peninsula, soccer tournaments would be offered in the fall for girls, and in the spring for boys.

actors such as Nike, professional teams, or the NCAA.

Basketball. The district court found that Michigan girls playing basketball in fall "cannot participate in special events for professional or semi-professional teams, such as playing before or at half-time of a professional game," or in "national shoot-outs such as the Nike and Blue Star shootouts." Pet. App. 90a, 93a. There was no evidence that MHSAA even took these third-party scheduling decisions into account when selecting the boys' seasons, yet it was found to violate the constitution by failing to make them paramount for the girls. The district court also found that Michigan girls "do not get to participate in 'March Madness' or the excitement and publicity surrounding this time period," *id.* at 90a, and are less likely to make the Parade All-American lists that come out in March, because "'everybody's forgotten about you.'" *Id.* at 92a.[4]

The district court discounted testimony from the University of Michigan head women's basketball coach, who testified that the fall season is actually a substantial recruiting *advantage* for Michigan girls because college coaches can attend as many high school games as they like before the beginning of October. *Id.* at 94a. It is also more convenient for college coaches to visit high schools during the fall, because their own teams have not begun practicing. *Id.* The district court concluded, however, that MHSAA had provided "only circumstantial evidence that Michigan girls playing in winter would not be recruited at the same level that the MHSAA asserts they are in the fall," and that in any event, "moving girls' basketball to the traditional winter season would still give girls exactly equal opportunity to be recruited for collegiate play as boys' basketball players." *Id.* at 88a-89a.

Volleyball. MHSAA scheduled the girls' volleyball

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[4] The district court conceded that Michigan girls were still eligible for the All-American list, but stated that "MHSAA did not ... provide any evidence that suggested that the ability to be ranked was not influenced by the fall playing season." *Id.* at 92a-493a.

tournament in the winter instead of the fall because (as plaintiffs themselves have insisted) there is a shortage of winter sports for girls. That schedule has been highly successful. Winter volleyball attracts more participants than any other girls' sport. Pet. App. 97a.

Volleyball is not offered for Michigan boys, but the district court found that the winter season "disadvantages" plaintiffs *in comparison to girls in other states* who play volleyball in the fall. The court reasoned that college recruiting for girls' volleyball principally focuses on private club programs rather than interscholastic competition, and, because of conflicts with the Michigan schedules, Michigan girls are less highly seeded in private club tournaments and are named to All-American teams and national rankings less often than girls from other states. Pet. App. 99a-105a.

The district court acknowledged MHSAA's evidence that girls benefit from playing both basketball and volleyball, but again concluded that MHSAA had not carried its burden of proof because it "presented no evidence to indicate why" any facilities conflicts could not be solved if the volleyball season "were to be switched with girls' basketball." *Id.* at 106a. The court similarly recognized that "MHSAA is correct that Michigan girls and their high school coaches have had success in volleyball in which the entire state can take pride," but concluded that "MHSAA failed to prove whether this indicates that the winter, non-traditional volleyball season is not a disadvantage ...." *Id.*

Virtually all of plaintiffs' non-party witnesses at trial were volleyball coaches. Thus, the centerpiece of plaintiffs' evidence of "disparate treatment" concerned the scheduling of a sport that Michigan boys are not even given the opportunity to play. CAJA 3621, 3663, 3782, 3872, 3897.

Soccer. Michigan girls play soccer in the spring, and the boys play in the fall. The court acknowledged that there is not "one clear season in which high school girls play in soccer across the nation," and that 22 states schedule girls' soccer in the spring. Pet. App. 107a & n.30. Nonetheless it

concluded that the spring schedule is disadvantageous because sometimes the fields are frozen when the season begins, which can force more frequent make-up games and increase the risk of injury. *Id.* at 108a-109a. It also found that private club and amateur programs generally take place in the spring, and that Michigan girls thus must choose between outside leagues and interscholastic competition. *Id.* at 110a. Michigan girls also may not have been seen by college recruiters in their senior year before the first round of scholarships are awarded in November. *Id.* at 109a-110a. The court also found that MHSAA failed to carry its burden of proving that the spring schedule did not hurt Michigan girls in the "All-American" rankings. *Id.* at 110a-111a.

The district court acknowledged that the spring schedule has some advantages. Girls can play soccer on Friday nights in the spring, while the boys cannot in the fall because of football. *Id.* at 111a. There are more experienced officials available in the spring, because colleges play soccer in the fall. *Id.* A combined season could be difficult because a third of high school coaches in Michigan coach both the boys' and girls' teams, and because "[t]he quality of the surfaces of soccer fields will ... decline with twice as many players on them." *Id.* at 111a-112a. But the district court again held that MHSAA had simply failed to carry its burden of proof. *Id.* at 107a, 112a.

Lower Peninsula Golf. Some, but not all, of Michigan's girls' golf teams play in the spring—which is the traditional season for golf, the season the NCAA uses, and the season in which all Michigan boys played until the 1970s. The district court nonetheless found that the spring is disadvantageous because the courses are in poorer condition and girls must compete for tee times with more members of the public. Pet. App. 113a-114a. It also noted that college letters of intent are traditionally signed in November, and some Michigan girls have not yet played their senior season by then. Boys, playing in the fall, also go straight from summer play into their season, while girls must rebuild their skills after the winter break. *Id.* at 114a.

The court acknowledged MHSAA's point that the longer daylight hours in the spring make it "easier to play eighteen holes of golf without missing school," but found that did not "make[] up for the other disadvantages of the spring golfing season." *Id.* at 115a. Once again, it held MHSAA had failed to carry its burden of proof: "No significant evidence was introduced ... that logistics would make maintaining both the girls' team and the boys' team in the same Lower Peninsula golf season difficult or impossible." *Id.*

Lower Peninsula Swimming. The Michigan girls' Lower Peninsula swimming and diving season is in the fall, and the boys swim in the winter. The district court found that the winter season was better because private club tournaments take place in winter so boys can go directly from their season to club tournaments while girls have a gap. National and amateur swim meets also take place in the spring, so girls face a larger gap between their season and the tournaments. Pet. App. 117a-118a. The winter season is also two weeks longer. *Id.* at 118a. On the other hand, the court recognized that fall allows girls to transition smoothly from *summer* swimming and has fewer interruptions like exams, the winter holidays, and spring break. *Id.* at 119a. It also acknowledged MHSAA's proof that "high school swimming programs in Michigan are flourishing for girls, but declining for boys." *Id.*

The district court held that MHSAA had not carried its burden of proving a need for separate seasons. Although it acknowledged that one third of Michigan swimming coaches coach both girls and boys, *id.* at 119a, the court held that "the anecdotal evidence presented of logistical problems was insufficient to prove logistical problems would occur if both sexes swam in the same season." *Id.* at 115a. And "[i]f logistical problems would exist, there was also insufficient evidence that those problems would not have solutions." *Id.*

Tennis. The court concluded that the boys' spring season for tennis is better than the girls' fall season. The fall season is approximately 20 days shorter than the spring. Pet. App. 121a. The spring season immediately precedes

the U.S. Tennis Association's tournament circuit, so boys have played more immediately before that circuit than girls. *Id.* (Of course, the district court thought that *following* summer play was an unfair advantage for boys in golf).

Proceedings On Appeal

On initial appeal, the Sixth Circuit adopted the district court's findings, and affirmed. The Sixth Circuit agreed with the district court that "scheduling team sports in different seasons based on gender" was a facial gender classification, and that the burden was therefore on MHSAA to show an "exceedingly persuasive" justification—*i.e.*, that its scheduling decisions were substantially related to achieving an important government objective. *Id.* at 63a. It held that MHSAA had not met that burden. *Id.* at 64a. The Sixth Circuit also squarely rejected MHSAA's argument that plaintiffs were required to prove discriminatory animus. "Disparate treatment based upon facially gender-based classifications evidences an intent to treat the two groups differently. *VMI* imposes no requirement upon [plaintiffs] to show that an evil, discriminatory motive animated MHSAA's scheduling of different athletic seasons for boys and girls." *Id.* at 65a. It declined to consider the claims under Title IX or the Michigan statute because the Equal Protection ruling sufficed to affirm the injunction.

MHSAA petitioned this Court for certiorari. MHSAA first argued that once a classification by sex is conceded to be legal, good faith decisions implementing that classification should not once again be characterized as gender classifications. MHSAA's seasonal schedules do not classify anyone, and any disparate impact on girls resulting from such schedules is unconstitutional only if the plaintiffs prove discriminatory intent. MHSAA noted that other circuits had properly placed the burden on the plaintiffs in such circumstances, and that respondents had not even attempted to satisfy that burden (and could not).

Second, MHSAA pointed to an acknowledged three-to-three circuit split on whether Title IX's comprehensive

remedial regime preempts parallel gender discrimination claims brought under § 1983. This Court explained in *Middlesex County Sewerage Authority v. National Sea Clammers Association*, 453 U.S. 1, 20 (1981) ("*Sea Clammers*"), that when Congress enacts a comprehensive statutory regime that provides adequate protections for certain rights, Congress may intend to preclude similar claims under § 1983. The Second, Third, and Seventh Circuits have all ruled that Title IX's comprehensive regime of remedies precludes a plaintiff from bringing a constitutional claim under § 1983 based on the same facts. The Sixth, Eighth, and Tenth Circuits have each held the opposite, establishing a square and acknowledged split.

This Court GVR'd in light of *Rancho Palos Verdes*, a recent decision applying the *Sea Clammers* doctrine. On remand, the Sixth Circuit readopted its original reasoning. It first reaffirmed its circuit precedent that Title IX does not preclude parallel Equal Protection claims enforced through § 1983. It concluded that Title IX "contains no comprehensive enforcement scheme" sufficient to displace § 1983 because "the only enforcement mechanism expressly authorized in Title IX is the withdrawal of federal funds." Pet. App. 14a. The court held that the private right of action this Court recognized in *Cannon v. Univ. of Chicago*, 441 U.S. 677 (1979), is irrelevant to determining Congress's intent, because it is not expressly contained in the statute.

The court of appeals again concluded that the scheduling decisions were "facially gender-based classifications." Pet. App. 29a. It held that "the issue is not whether *any* difference between male and female high school sports is deserving of being classified as a case of disparate treatment. Rather, the issue is whether the seasonal scheduling differences on the basis of gender that *result in unequal treatment* of women in comparison to men is considered disparate treatment." *Id.* at 30a. It held that "MHSAA has failed to satisfy its burden of justifying its discriminatory scheduling practices under *V.M.I.*" *Id.*

Finally, the court of appeals also "agree[d] with the

district court that proof of a discriminatory motive is not required for a Title IX claim based on disparate treatment," and upheld the district court's decision that MHSAA was in violation of Michigan's Elliott-Larsen Act. Pet. App. 33a.

Judge Kennedy dissented in part. She would have held that the private right of action under Title IX is sufficiently comprehensive to evidence Congress's intent that it be the exclusive remedy in these circumstances. Pet. App. 38a.

REASONS FOR GRANTING THE WRIT

This case presents this Court with an opportunity to resolve a conflict among the circuits that is profoundly important to the administration of single-sex programs. As this Court recognized in *VMI*, separate programs or facilities will never be precisely identical. Even if the women's leadership program at Mary Baldwin College that Virginia proffered as an alternative to VMI had been substantially equal in resources, facilities, and programs, it would still have been located in Staunton, not Lexington. The layout of the campus would have been different. Its faculty would have been weaker in some subjects, and stronger in others. And the menu served by its cafeteria would not have been the same, day to day, as the food served at VMI. None of those differences would have been the result of a decision that overtly segregated by gender.

Similarly, the separate girls' teams in this case will inevitably play at different times, on different fields, with different equipment, and under different rules than the boys' teams do. Indeed, they frequently play entirely different sports (volleyball instead of football, for example). Even if plaintiffs succeed in moving the Michigan girls' basketball season to the winter, school principals will still have to decide what night and time to schedule the girls' and boys' games, and when to give each team use of practice courts, the school's weight room, or a particular coach that both would prefer. Indeed, consolidating girls and boys into the same season in every sport would greatly exacerbate such resource conflicts. To make a constitutional case out of

such differences, plaintiffs must prove intentional discrimination, *i.e.*, that the decisionmaker chose to give the girls' basketball team the Tuesday practice time or the less experienced coach *because they are girls*. Or, plaintiffs might try to prove that the separate athletic programs for boys and girls are substantially unequal overall, like the educational programs considered by this Court in *VMI*.

Respondents proved neither. The Sixth Circuit instead shifted the burden of proof and held that intentional discrimination must be *presumed* here, because MHSAA's schedules are somehow a "facial classification." Pet. App. 30a. That is a serious error. The only facial classification here is Michigan's decision to have separate sports teams for boys and girls. Once that separation is in place, scheduling particular athletic contests "classifies" students, if at all, only as members of particular teams. Such decisions have a *disparate impact* by gender because of the pre-existing composition of the teams. But that is no reason to presume intentional discrimination.

The Sixth Circuit's holding conflicts with this Court's decision in *VMI*, and with decisions of the Third, Fourth, Eighth, and D.C. Circuits—all of which have recognized that differences in implementation between separate male and female programs are not themselves facial classifications, and are not presumptively unconstitutional. If every difference that creates an arguable disadvantage is treated as a separate, facial gender classification requiring an "exceedingly persuasive justification," the ensuing litigation will be endless and separate facilities or programs—athletic teams, schools, prisons, even bathrooms—will, for all practical purposes, become unconstitutional.

For the same reason, the Sixth Circuit's Title IX ruling is wrong as a matter of law because plaintiffs have not proven intentional "discrimination" "on the basis of sex." 20 U.S.C. § 1681(a). The Sixth Circuit presumed intentional discrimination and therefore found a Title IX violation without requiring any proof from the plaintiffs. That decision squarely conflicts with decisions of other circuits.

In addition, this case presents this Court with an opportunity to resolve a separate, longstanding circuit split over whether the comprehensive remedies created by Title IX preempt athletic gender discrimination claims brought under § 1983. In *Rancho Palos Verdes*, this Court clarified that the "ordinary inference" from the existence of a private right of action under a statute is that Congress intends that remedy to displace § 1983. 544 U.S. at 122. The Sixth Circuit, along with the Eighth and Tenth Circuits, continue to insist that the private right of action to enforce Title IX recognized by this Court in *Cannon* is irrelevant because it is not expressly contained in the statute. That conflicts with decisions of the Second, Third, and Seventh Circuits.

I. THE SIXTH CIRCUIT PRESUMED INTENTIONAL DISCRIMINATION IN CONFLICT WITH DECISIONS OF THIS COURT AND OTHER COURTS OF APPEALS

A. Differences In Single-Sex Programs Are Constitutional Unless The Plaintiff Proves Discriminatory Animus, Or That The Programs Are Substantially Unequal Overall

This Court has indicated that separate facilities for men and women will sometimes satisfy intermediate scrutiny.[5] Separate facilities must of course be substantially equal, but need not be identical. Both the Fourth Circuit majority and dissent in *VMI* agreed that the test was whether the two programs "afford[ed] to both genders benefits comparable in substance, but not in form and detail." *United States v. Virginia*, 44 F.3d 1229, 1240 (4th Cir. 1995); *cf. id.* at 1250 (Phillips, J., dissenting) (arguing that single-sex schools must have "substantially comparable curricular and extra-

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[5] Even in *VMI*, this Court "d[id] not question the Commonwealth's prerogative evenhandedly to support diverse educational opportunities," including single-gender schools. 518 U.S. at 533 n.7. And it acknowledged that "[a]dmitting women to VMI would undoubtedly require alterations necessary to afford members of each sex privacy from the other sex in living arrangements, and to adjust aspects of the physical training programs." *Id.* at 550 n.19.

curricular programs, funding, physical plant, administration and support services, and faculty and library resources"). In reversing, this Court cited with approval both Judge Phillips's "substantially comparable" formulation and the "substantial equality" or "substantially equivalent" test that it had applied in *Sweatt v. Painter*, 339 U.S. 629 (1950). *See VMI*, 518 U.S. at 547 n.17, 553-54; *see also id.* at 563-65 (Rehnquist, C.J., concurring) (equal protection does not require identical schools, but merely "two institutions [that] offered the same quality of education and were of the same overall caliber"). This Court held that "Virginia has not shown substantial equality in the separate educational opportunities the Commonwealth supports at VWIL and VMI." *Id.* at 554. It pointedly *did not* hold that every difference must satisfy intermediate scrutiny.

Particular differences are unconstitutional only if they represent intentional discrimination. As this Court has explained, "'discriminatory purpose'" "implies more than intent as volition or intent as awareness of consequences. It implies that the decisionmaker ... selected or reaffirmed a particular course of action at least in part 'because of,' not merely 'in spite of,' its adverse effects upon an identifiable group." *Personnel Adm'r v. Feeney*, 442 U.S. 256, 279 (1979) (citation omitted). Laws or policies that "classify" persons by race or sex *on their face* give rise to a presumption of discriminatory purpose. But in the absence of a facial classification, intent must be proven.

B. The Scheduling Decisions Challenged Here Are Not Facial Gender Classifications

The Sixth Circuit held that MHSAA's schedules are a "facial classification," and that therefore discriminatory intent may be presumed. That is wrong as a matter of law.

Plaintiffs do not challenge the only true facial classification at work in this case: the original decision to have separate high school sports teams for boys and girls. Because of the "enduring" physical differences between men and women, *VMI*, 518 U.S. at 533, separate teams are

essential to any meaningful pursuit of equal athletic opportunities. But once the need for separate programs is conceded, administrators must make a host of implementing decisions—such as what sports they will play, when the teams will play, when they will have access to the weight room, or who their coach will be. A high school principal "classifies" students according to gender if she decrees that the school will have separate boys' and girls' soccer teams. But simply purchasing new uniforms for the girls' team but not the boys' is not a facial classification, and may have nothing to do with sex. The boys must actually prove they were denied new uniforms *because they are boys.*

Similarly, a decision to hold the girls' basketball tournament in December does not classify anyone by sex, any more than holding that tournament in March (plaintiffs' preferred alternative) would. These are simply dates on a calendar, like the lines on a map considered in *Shaw v. Reno*, 509 U.S. 630 (1993). This Court explained in *Shaw* that a districting statute "typically does not classify persons at all; it classifies tracts of land, or addresses." 509 U.S. at 646. The decisions challenged here similarly classify athletic contests—or, at most, members of particular sports teams. The fact that all the members of some teams are of one gender does not make the choice of a tournament date into a facial gender classification, especially since the same scheduling choice would have to be made if the teams were of mixed genders. Likewise, discrimination against pregnancy in insurance plans is not a facial gender classification even though only women become pregnant, *Geduldig v. Aiello*, 417 U.S. 484, 496 n.20 (1974), civil service preferences for veterans are not facial classifications even if veterans are overwhelmingly men, *Feeney*, 442 U.S. at 274, and firing employees because their pension is about to vest is not age discrimination even though nearly all employees in that position are older, *Hazen Paper Co. v. Biggins*, 507 U.S. 604 (1993). The only exception is if the lines are "so bizarre as to permit of no other conclusion" than discrimination. *Shaw*, 509 U.S. at 646. Respondents have

never alleged, and no court has ever found, that MHSAA's scheduling decisions are so bizarre and unexplainable on other grounds that they must have been motivated by discriminatory intent. "Whatever the employer's decisionmaking process, a disparate treatment claim cannot succeed unless the employee's protected trait actually played a role in that process and had a determinative influence on the outcome." *Hazen Paper*, 507 U.S. at 610.

The Sixth Circuit tried to limit the breadth of its ruling by insisting that "the issue is not whether *any* difference between male and female high school sports is deserving of being classified as a case of disparate treatment. Rather, the issue is whether the seasonal scheduling differences on the basis of gender that *result in unequal treatment* of women in comparison to men is considered disparate treatment." Pet. App. 30a. That misses the point and supplies no limiting principle at all. As this case demonstrates, any difference can be said to create a "disadvantage" or "result in unequal treatment" in the eyes of one side or another. The relevant question is whether that disadvantage was intentionally assigned to one group *because of its sex*. The Sixth Circuit's standard does not address that question at all. Some disappointments are simply inevitable. A school with only one experienced basketball coach may be forced to choose between having him coach the girls' team or the boys' team, or maybe both but only if they play in separate seasons. Under the Sixth Circuit's analysis, the school will have engaged in intentional gender discrimination no matter what it decides, and must provide an "exceedingly persuasive justification" for a decision that might have been based on a coin flip.

Plaintiffs therefore had to prove that the challenged scheduling decisions were in fact motivated by discriminatory animus (*i.e.*, that these dates were chosen at least in part "because of," not merely "in spite of," the gender composition of the teams). Alternatively, plaintiffs might have attempted to satisfy their burden by demonstrating that the separate athletic programs that

Michigan high schools sponsor for girls and boys are not "substantially equal" under *VMI*.[6] Plaintiffs did neither. Instead, the district court and the Sixth Circuit improperly relieved them of those burdens by treating every decision implementing a program that happens to be single-sex as a facial classification, shifting the burden of proof to MHSAA. That approach is an invitation to constitutional litigation over every detail of how single-sex programs are implemented. For example, different school buses or uniforms for boys' and girls' teams, different sites for boys' and girls' schools, and different educational offerings at male and female prisons are all presumptively unconstitutional in the Sixth Circuit if anyone thinks those differences result in unequal treatment. The courts below even presumed discrimination from the fact that MHSAA's girls' volleyball schedule differs from that used by *girls in other states*.

Despite years of discovery, dozens of depositions, and MHSAA's production of more than 100,000 documents, respondents did not remotely develop evidence sufficient to support a ruling in their favor under a proper legal standard, and judgment should have been entered for MHSAA. Respondents made no effort to articulate a meaningful conception of what "substantial equality" in overall athletic offerings would mean, or to evaluate whether Michigan's offerings satisfied it. The district court's conclusion that girls received "all of the disadvantageous playing seasons" *among the six sports that plaintiffs chose to focus on*, Pet. App. 147a, certainly is not equivalent to a finding that the overall athletic offerings were not substantially equal. Michigan girls have the opportunity to participate in tournaments in 18 sports, while boys have only 14. CAJA 2004. Respondents claim a "disadvantage" as to just 6 of the 18 sports. And many of

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[6] *VMI* held that a facial classification establishing separate programs was not justified because the programs were substantially unequal. Plaintiffs have never even attempted such a challenge. They concede that the classifications establishing separate programs here are constitutional.

the "advantages" the district court identified in the boys' seasons are enjoyed by *girls* in other sports.[7] There could be no finding of overall inequality on these facts.

Plaintiffs also presented no evidence that would support a finding that MHSAA adopted these particular schedules "because of," not merely "in spite of," any perceived disadvantages to its female athletes. Indeed, plaintiffs' *only* argument regarding intent has been that they need not prove anything because animus should be presumed. Plaintiffs have never genuinely contended that MHSAA was motivated by an actual desire to disadvantage girls. MHSAA vigorously disputed plaintiffs' contention that the supposed "disadvantages" exist at all. MHSAA sincerely believes that the challenged schedules are tangibly *better* for girls overall than the alternatives proffered by plaintiffs. The district court disagreed (after a wide-ranging foray into athletic policy-making disguised as constitutional law), but did not find that MHSAA was motivated by gender animus.

Nor can an inference of discriminatory animus be sustained on the basis of evidence that MHSAA sought to avoid unnecessary disruption of pre-existing boys' tournament schedules when it began adding new tournaments for girls in 1972. Sports were added over time based on the order they emerged, not the gender of the players. Plaintiffs never offered any proof that MHSAA made those initial choices *because of, not merely in spite of* any adverse impact on girls. To the contrary, the very evidence plaintiffs offered to show that MHSAA scheduled the girls' tournaments around the pre-existing boy's tournaments included MHSAA's explanation that the original girls' schedule "allowed for the best use of facilities,

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[7] The court found that girls are "disadvantaged" because their basketball, swimming and diving, and tennis seasons are shorter. But the girls have longer seasons in golf and soccer. Pet. App. 107a-108a, 112a-113a. The court thought it an advantage that the spring tennis season for boys flows naturally into summer club play. *Id.* at 121a. But the girls' fall seasons in tennis and basketball follow right *after* summer play, which the district court held was an advantage for boys' golf. *Id.* at 114a.

faculty, and officials." CAJA 2882. One witness testified that MHSAA council members told her in 1973 that "one important consideration" for having girls' basketball in fall "would be that facilities would not be as taxed." CAJA 4039. An effort to maximize the use of resources, and thus participation, while avoiding unnecessary disruption of the entire program each time a sport was added—again, gender neutral—does not support an inference of bias.

It also bears emphasis that the evidence established that many coaches, parents, and athletic directors, who were not alleged to harbor gender animus, shared MHSAA's view that the current schedule represents the best alternative for the greatest number of female athletes. Examples abound. A survey of Michigan female athletes in 1999 established that fewer than one-third thought girls and boys teams should play in the same season. CAJA 4476-78, 3344. The University of Michigan women's basketball coach testified that the current girls' schedule was "more convenient" for recruiting and provided "more visibility for Michigan's girls to be recruited." CAJA 163. Several girls' coaches testified that "the girls programs are flourishing a lot more than the boys," CAJA 4646, the "current alignment of seasons allows us to have two to three times more matches than most other states," CAJA 4513, and "in the 13 years I've been coaching the girls, the participation for girls has more than doubled." CAJA 4604. Kathy Lindahl, former associate athletic director at Michigan State, testified that she had "a passion for girls and women in sport," and had "dedicated basically my whole career and life to providing those opportunities for girls and women in sports," and believed that MHSAA's current schedules provide "an advantage" for all students. CAJA 4435-36. And a great many of the "disadvantages" the district court saw in the current schedules relate to private club competition, Nike shoot-outs, All-American rankings, and other concerns that affect only a few elite athletes and that are far removed from the core educational goals of MHSAA's member schools. The evidence establishing a good faith disagreement forecloses any

presumption that any perceived disadvantages simply *must* be a product of intentional discrimination. *See, e.g., Villanueva v. Wellesley College*, 930 F.2d 124, 132 (1st Cir. 1991) (by showing a good faith dispute over the wisdom of its actions, defendant "has successfully dispelled any inference of discrimination").

C. The Sixth Circuit's Holding Conflicts With Decisions Of Other Circuits

The Sixth Circuit's opinion conflicts with decisions of the Third, Fourth, Eighth, and D.C. Circuits.

The court's reasoning conflicts with the Fourth Circuit's decision in *VMI* for reasons discussed briefly above. Both the majority and dissent agreed in *VMI* that the issue was whether the overall educational experience offered by VWIL was substantially equal to VMI. Neither treated particular differences between the two programs as presumptively unconstitutional facial gender classifications. Although this Court reversed the Fourth Circuit's conclusion that VWIL *was* substantially equal, it framed the issue similarly—and cited both Judge Phillips's Fourth Circuit dissent and a similar formulation from *Sweatt* with approval. *See VMI*, 518 U.S. at 547 n.17, 553-54.

For similar reasons, this case conflicts with the Third Circuit's decision in *Vorchheimer v. School District*, 532 F.2d 880, 882 (3d Cir. 1976), *aff'd*, 430 U.S. 703 (1977), which upheld the constitutionality of separate male and female public high schools that were "similar and of equal quality," although different in some respects. (The district court had held "'that [generally] the education available to the female students ... is comparable,'" although the "academic facilities ... in the scientific field ... are superior" at the boys' school. *Id.* (first alteration in original).) *Vorchheimer* applied intermediate scrutiny in the alternative. *Id.* at 888.

The Sixth Circuit's reasoning also conflicts with a line of cases from the Eighth and D.C. Circuits evaluating differences between men's and women's prisons. In *Klinger v. Department of Corrections*, 31 F.3d 727 (8th Cir. 1994),

cert. denied, 513 U.S. 1185 (1995), a class of female inmates sued Nebraska alleging that its women-only prison offered inferior vocational, educational, and employment opportunities, rehabilitation programs, and medical and psychological services compared to its men-only prisons. The district court held that Nebraska bore the burden of justifying any differences under intermediate scrutiny. Reversing, the Eighth Circuit majority pinpointed precisely the error committed by the Sixth Circuit in this case:

> The dissent and the district court both erroneously assume that this is a case involving a facial gender classification. There is simply no Nebraska statute or policy that distinguishes on its face between men and women as to prison programs. ... There is of course a facial classification in Nebraska prisons in that male and female inmates are segregated by institution, with the exception of the two integrated institutions. The plaintiffs, however, do not challenge this classification. The dissent and the district court apparently reason that if women are sent to [the women's prison] because of their sex that the programs they receive are necessarily based on their sex.
>
> ... [D]etermining whether the plaintiffs receive inferior programs because of their sex or for some other reason requires looking beyond the fact that female prisoners are segregated from men and examining the reasons behind the defendants' programming decisions.

31 F.3d at 734. The Eighth Circuit recognized that "female inmates can always point out certain ways in which male prisons are 'better' than theirs, just as male inmates can always point out other ways in which female prisons are 'better' than theirs." *Id.* at 732. That does not mean, however, that such differences are necessarily the result of intentional sex discrimination. *Id.* at 733. The Eighth Circuit held that the district court's analysis improperly

"shifted the burden to the defendants to justify differences in prison programming," which "effectively relieved the plaintiffs of their burden of persuasion on the ultimate issue of discriminatory purpose." *Id.* at 734.

The Eighth Circuit revisited this issue in *Keevan v. Smith*, 100 F.3d 644 (8th Cir. 1996), which challenged the placement of particular prison industries resulting in, *inter alia*, 21 enterprises at men's prisons and only 3 at women's prisons. The court acknowledged that the mix was different for men's and women's prisons, but held that the provision of particular opportunities is facially neutral and refused to presume intentional discrimination. As in *Klinger*, "the women prisoners do not challenge the Department policy of segregating male and female prisoners by gender. Rather they challenge the Department policy which determines the placement of a particular prison industry at a specific penal facility." 100 F.3d at 650. The Eighth Circuit ruled that such decisions are not facial classifications, and that "it is appellants' burden to establish that the adverse effect this Department policy has on women inmates is the result of a discriminatory purpose." *Id.* at 651.

In *Women Prisoners of the District of Columbia Department of Corrections v. District of Columbia*, 93 F.3d 910 (D.C. Cir. 1996), *cert. denied*, 520 U.S. 1196 (1997), the D.C. Circuit confronted a similar challenge to differences between men's and women's prisons. Plaintiffs alleged that the men's prisons included more work details, prison industries, and recreation opportunities. 93 F.3d at 915-16. The D.C. Circuit noted that "the segregation of inmates by sex is unquestionably constitutional," and that plaintiffs had "not alleged that the District allocates fewer resources per female inmate." *Id.* at 926. Instead, they were "inviting this court to find that the District's decision to provide male (but not female) inmates with access to any particular program violates equal protection principles." *Id.* The D.C. Circuit recognized that, under that reasoning, "any divergence from an identity of programs gives rise to equal protection liability." *Id.* It rejected that "program-by-program

method of comparison," citing *Klinger* and *VMI*.[8]

The Sixth Circuit committed precisely the error that the Eighth and D.C. Circuits reversed in the prison cases, and that the Third and Fourth Circuits avoided in *Vorchheimer* and *VMI*: it wrongly presumed that any differences between separate male and female programs were the result of facial gender discrimination. If this case had arisen in the Third, Fourth, Eighth, or D.C. Circuits, the court would have placed the burden on plaintiffs to prove an actual discriminatory purpose or true overall inequality, and MHSAA would have prevailed.

D. The Title IX Ruling Conflicts With Decisions Of Other Circuits

The Sixth Circuit's analysis under Title IX parallels its Equal Protection reasoning: if MHSAA's schedules "disadvantage" girls, then intentional discrimination (and thus a violation of Title IX) may be presumed. Pet. App. 32a.[9] That reasoning conflicts with decisions of other circuits under Title IX as well as its sister statute, Title VI.

In *Pederson v. Louisiana State University*, 213 F.3d 858 (5th Cir. 2000), the Fifth Circuit analyzed a claim under Title IX that LSU's decision not to create women's teams in soccer and fast-pitch softball was intentional discrimination. Even though LSU had a men's soccer program and a men's baseball program, the Fifth Circuit did not (like the Sixth

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[8] The Eighth Circuit and D.C. Circuit cases also held that the male and female prisoners were not similarly situated, but their discussions of the discriminatory purpose issue are alternative holdings, not dicta. *See Klinger*, 31 F.3d at 733 ("Even assuming the inmates are similarly situated, however, that is merely the beginning of the analysis."); *Keevan*, 100 F.3d at 650 ("Even assuming, for the sake of argument, that male and female inmates were similarly situated ..., an equal protection review ... requires further analysis."); *Women Prisoners*, 93 F.3d at 926 ("our decision here is altogether consistent with the Supreme Court's most recent articulation of equal protection principles in [*VMI*].").

[9] The district court in this case correctly dismissed all Title IX "disparate impact" claims pursuant to *Alexander v. Sandoval*, 532 U.S. 275 (2001). CAJA 935. Plaintiffs did not appeal that ruling.

Circuit here) simply assume that any disadvantageous difference between the men's and women's programs was a "facial classification" and therefore automatically intentional discrimination. Instead it closely examined the evidence for *why* LSU had not created women's programs in those sports, and concluded that the reason was "paternalism," "antiquated stereotypes," and archaic "assumptions about [women's] interests and abilities." 213 F.3d at 880-82. Indeed, LSU had "not even attempted to offer a legitimate, nondiscriminatory explanation for this blatantly differential treatment of male and female athletes, and men's and women's athletics in general; they merely urge that 'archaic' values do not equate to intentional discrimination." *Id.* at 881. The Fifth Circuit concluded that "[o]ur review of the record convinces us that an intent to discriminate, albeit one motivated by chauvinist notions as opposed to one fueled by enmity, drove LSU's decisions regarding athletic opportunities for its female students." *Id.* at 882.

The Sixth Circuit's reasoning in this case would render that entire inquiry into the *reasons* for LSU's "differential treatment" unnecessary, by simply presuming that any difference that can be characterized as a "disadvantage" is a facial classification and hence conclusive proof of intentional discrimination. The Fifth Circuit would have examined the evidence for why MHSAA selected the schedules it did, and would have concluded that good faith disagreement over which schedules are best for female athletes, and a desire to maximize participation and minimize resource conflicts, are not archaic stereotypes or any other form of discrimination. A schedule designed to maximize overall participation is virtually the hallmark of Title IX compliance, even if it is less than optimal for a few elite athletes like plaintiffs here.

Title IX cases are rarely litigated as straight intentional discrimination claims, but many courts have addressed the meaning of intentional discrimination under Title VI—which was the model for Title IX and is very similar in structure. *See Cannon*, 441 U.S. at 694 ("Title IX was patterned after Title VI"). Those courts have consistently held that Title VI

plaintiffs must prove that the challenged conduct was undertaken "'because of,' not merely 'in spite of,' its adverse effects upon an identifiable group." *Pryor v. NCAA*, 288 F.3d 548, 562 (3d Cir. 2002), quoting *Feeney*, 442 U.S. at 279; *Peters v. Jenney*, 327 F.3d 307, 321 n.18 (4th Cir. 2003). That principle is inconsistent with the Sixth Circuit's reasoning, for reasons explained above.

II. THIS COURT SHOULD DETERMINE WHETHER TITLE IX'S COMPREHENSIVE REMEDIES PRECLUDE § 1983 CLAIMS

This case also provides the Court with the opportunity to resolve a longstanding and acknowledged circuit split over whether the use of § 1983 in this context is precluded by the comprehensive remedial scheme established in Title IX. The court of appeals reaffirmed its precedent that Title IX does not preclude under § 1983 remedies. That was clear legal error, and conflicts with the settled law of this Court and the Second, Third, and Seventh Circuits.

A. Congress Intended Title IX To Provide The Exclusive Remedies For Athletic Gender Equity Cases

Section 1983 "is not itself a source of substantive rights, but a method for vindicating federal rights elsewhere conferred by those parts of the United States Constitution and federal statutes that it describes." *Baker v. McCollan*, 443 U.S. 137, 144 n.3 (1979). But if Congress has intended that another statutory scheme be the exclusive method for vindicating a right, plaintiffs must use that statute. *Sea Clammers* held that other statutes may preempt § 1983 "when the remedial devices provided in a particular Act are sufficiently comprehensive." 453 U.S. at 20. "The crucial consideration is what Congress intended." *Smith v. Robinson*, 468 U.S. 992, 1012 (1984).

The crux of the circuit split, and of the Sixth Circuit's error, centers on the private right of action to enforce Title IX. The Sixth Circuit held that Title IX "contains no comprehensive enforcement scheme" sufficient to displace

§ 1983 because "the only enforcement mechanism expressly authorized in Title IX is the withdrawal of federal funds." Pet. App. 14a. It held that the private right of action this Court identified in *Cannon* is irrelevant to determining Congress' intent, because that private right is not expressly contained in the statute. *Id.* at 17a.

That is incorrect. As the Second, Third, and Seventh Circuits have properly held, *Sea Clammers* is about what Congress intended, and the holding of *Cannon* is that Congress intended to create a private right of action to enforce Title IX. This Court held in *Cannon* that "the history of Title IX rather plainly indicates that Congress intended to create such a [private] remedy," 441 U.S. at 694, and that "Congress itself understood Title VI, and thus its companion, Title IX, as creating a private remedy." *Id.* at 699. This Court inferred "an intent on [Congress'] part to have such a remedy available," *id.* at 717, even if Congress did not explicitly mention it in the statutory text. The Sixth Circuit's assumption that since the private remedy is not express Congress must not have intended it is simply inconsistent with *Cannon*.

Once Title IX's full panoply of private remedies is considered, Title IX clearly precludes parallel § 1983 claims. *Rancho Palos Verdes* confirmed that the "ordinary inference" from the existence of a private judicial remedy is that Congress intended it to be exclusive. 544 U.S. at 122. Indeed, this Court noted that when private remedies are available, it has *never* allowed parallel § 1983 claims. *Id.* Permitting § 1983 claims would circumvent important limitations on Title IX, such as its prohibition on punitive damages, *see Barnes v. Gorman*, 536 U.S. 181, 188-89 (2002), and its regulatory safe harbor provisions. *See, e.g.*, Title IX of the Education Amendments of 1972, A Policy Interpretation, Title IX and Intercollegiate Athletics, 44 Fed. Reg. 71,413 (Dec. 11, 1979). For example, a school with historically fewer opportunities for women need not have achieved a level of participation opportunities substantially proportionate to female enrollment, so long as the school can

show "a history and continuing practice of program expansion." *Id.* at 71,418. If § 1983 suits are allowed to circumvent Title IX, decades of reliance on compliance with Title IX will be threatened.

B. The Sixth Circuit's Holding Entrenches A Deep And Acknowledged Circuit Split

In 1996, the Sixth Circuit held in *Lillard v. Shelby County Board of Education*, 76 F.3d 716 (6th Cir. 1996), that Title IX did not preclude constitutional claims under § 1983. After this Court's decision to GVR in light of *Rancho Palos Verdes*, the Sixth Circuit reaffirmed *Lillard* and solidified the three-to-three circuit split.

The Eighth and Tenth Circuits agree with the Sixth Circuit, and both acknowledged the circuit split. *Crawford v. Davis*, 109 F.3d 1281, 1283 (8th Cir. 1997), *Seamons v. Snow*, 84 F.3d 1226, 1233-34 (10th Cir. 1996). Those Circuits, like the Sixth, refuse to give weight to the private remedies identified by this Court in *Cannon*. The Eighth Circuit focused on Title IX's remedial scheme and concluded that Title IX remedies were a "far cry from" the elaborate remedies in *Sea Clammers*. *Crawford*, 109 F.3d at 1284. The Tenth Circuit agreed that "Title IX does not have a 'comprehensive enforcement scheme,'" *Seamons*, 84 F.3d at 1234, quoting *Lillard*, 76 F.3d at 723. The Tenth Circuit also questioned whether a statute could "preempt independently existing constitutional rights." *Seamons*, 84 F.3d at 1233.

In contrast, the Third Circuit has held that Title IX's comprehensive remedies demonstrate Congressional intent to displace § 1983. *See Williams v. Sch. Dist.*, 998 F.2d 168, 176 (3d Cir. 1993); *see also Pfeiffer v. Marion Ctr. Area Sch. Dist.*, 917 F.2d 779, 789 (3d Cir. 1990). Two other circuits have joined the Third. The Seventh Circuit examined the full range of private remedies under Title IX and held that

> [t]he provision of these remedies suggests that Congress saw Title IX as the device for redressing any grievance arising from a violation of federal civil rights by an educational institution. Through

> the establishment of this statutory regime, Congress effectively superseded a cause of action under § 1983 that was based on constitutional principles of equal protection.

Waid v. Merrill Area Pub. Sch., 91 F.3d 857, 863 (7th Cir. 1996). The Second Circuit has likewise concluded that Title IX's "complex administrative enforcement scheme" and the private causes of action that give a Title IX plaintiff "access to a full panoply of remedies including equitable relief and compensatory damages" evince an intent by Congress to displace § 1983. *Bruneau v. S. Kortright Cent. Sch. Dist.*, 163 F.3d 749, 756 (2d Cir. 1998). The Second Circuit also held that "nothing in *Sea Clammers* ... would support a constitutional rights exception." *Id.* at 757-58, citing *Smith*, 468 U.S. at 1011-12.

III. THIS CASE RAISES ISSUES OF NATIONAL IMPORTANCE

The questions presented by this case have broad significance to the educational community. Decisionmakers and lower courts must have guidance concerning the difference between a facial classification and implementing decisions in single-sex programs. The Sixth Circuit's holding that defendants must supply an "exceedingly persuasive justification" for every individual difference between such programs will subject school administrators (and athletic directors, coaches, prison officials, and anyone else administering gender-segregated facilities) to the constant threat of litigation for every decision they make. It is no longer enough to justify having separate teams or schools or prisons; the Sixth Circuit's opinion means that every subsequent difference is now presumptively unconstitutional, and must be justified by the state under heightened scrutiny. Separate programs cannot thrive in that legal environment. These issues have become especially important in view of the renewed interest in establishing single-sex educational options at the elementary and secondary school level, with the express

encouragement of the U.S. Department of Education.[10]

The Sixth Circuit's ruling also has the perverse result of reversing years of gender equity gains by undermining proven efforts to maximize resources and provide better athletic opportunities for all students. These concerns are not hypothetical: in the face of comparable litigation, North Dakota switched its girls' volleyball and basketball seasons (the principal relief sought here), and witnessed a 10.6% drop in girls' basketball participation and a 7% drop in volleyball participation. South Dakota switched, and saw a 13.1% drop in girls' basketball. Montana switched, and observed a 10.9% drop in girls' basketball and 8.1% drop in girls' volleyball. West Virginia switched, and saw a stunning 19.4% drop in girls' basketball and a 27.4% drop in *boys'* basketball. Michigan continues to fight because it truly believes it is acting in the best interests of all its student-athletes and schools, and the participation numbers demonstrate that it is succeeding admirably.

The *Sea Clammers* issue also merits review. Congress plainly did not intend for the details of implementing gender equality in high school athletics to be worked out by the courts through abstract constitutional litigation under § 1983. It instead delegated authority for the promulgation of comprehensive regulations under Title IX, and the Department of Education's implementing guidance does not even mention the time of year when sports are played as an indicium of inequality.[11]

CONCLUSION

The petition for certiorari should be granted.

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[10] *See* Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance; Final Rule, 71 Fed. Reg. 62,530 (Oct. 25, 2006) (codified at 34 C.F.R. pt. 106) (adopting regulations "to provide recipients with additional flexibility in providing single-sex classes, extracurricular activities, and schools in elementary and secondary education").

[11] *See* Title IX of the Education Amendments of 1972, A Policy Interpretation, Title IX and Intercollegiate Athletics, 44 Fed. Reg. 71,413, 71, 416 (Dec. 11, 1979).

Respectfully submitted,

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